

NO. 82-6210

Office-Supreme Court, U.S.

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ALEXANDER L. STEVENS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JIMMIE LEE BURDEN, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether this Court has jurisdiction of claims which were neither presented to, nor resolved by, the Georgia Supreme Court?

II.

Whether the admission of testimonial evidence regarding other crimes or similar acts committed by Petitioner violated Petitioner's rights under the Fifth, Eighth, and Fourteenth Amendments?

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PART ONE

STATEMENT OF THE CASE

In December, 1981 Petitioner was indicted by a Washington County Grand Jury for the murder of Louise Wynn and her three children. (R. 9-10). After Petitioner was notified of the State's intention to seek the death penalty, a jury trial was commenced on March 1, 1982 and conducted in accordance with the Unified Appeal Procedure, O.C.G.A. § 17-10-36; Ga. Code Ann. § 27-2538. On March 4, 1982 the Petitioner was found guilty as charged on each of the four counts and death sentences were imposed for each conviction.

On direct appeal, Petitioner enumerated eight errors; only one of those issues is raised in the present petition. The Supreme Court of Georgia affirmed the convictions and three of the death sentences; however, the death penalty for Louise Wynn was set aside because it was based on a mutually supporting aggravating circumstance. See Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1982).

Respondent would refer this Court to the facts as set forth in the opinion of the Georgia Supreme Court on direct appeal. See Burden v. State, supra. In response to Petitioner's factual statement, Respondent would note that evidence was presented of incriminating statements by the Petitioner. Petitioner's former girlfriend Betty Jean Darrisaw testified at trial that Petitioner had once threatened her by stating "he was going to throw me in a pond like he did someone else." (T. 736). In addition, the State's chief witness, Henry Lee Dixon, testified that Petitioner admitted the murder of Ms. Wynn and repeatedly threatened Dixon's life if Dixon revealed his knowledge about Petitioner's involvement with the murders. (T. 641-45). Further facts will be developed, as necessary, for a more thorough illumination of any issue in this petition for a writ of certiorari.

PART TWO

SUMMARY OF ARGUMENT

I.

Respondent maintains that this Court is without jurisdiction to review two of the three issues raised in the instant petition because these issues were neither presented to nor resolved by the Georgia Supreme Court on direct appeal. Petitioner's argument that the Georgia Supreme Court necessarily considered these issues pursuant to the Georgia Unified Appeal Procedure governing death penalty cases does not satisfy this Court's Rule 17 or the guidelines set forth in previous decisions of this Court.

II.

The testimony of Willie Kate Dixon and Betty Jean Darrisaw relating to Petitioner's other crimes or similar acts was properly admitted under Georgia evidentiary law. Petitioner has failed to show that the challenged evidence was improperly admitted or that such evidence deprived Petitioner of a fundamentally fair trial under the Due Process clause of the Fifth Amendment.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT IS WITHOUT JURISDICTION OVER TWO OF PETITIONER'S THREE CLAIMS WHICH WERE NOT PRESENTED TO OR CONSIDERED BY THE GEORGIA SUPREME COURT.

Petitioner concedes that two of the issues presented to this Court were not presented to the Georgia Supreme Court on direct appeal. Petitioner contends that the state court "reviewed the entire record for errors" pursuant to the statutory mandate in the Georgia Unified Appeal Procedure statute. O.C.G.A. § 17-10-36; Ga. Code Ann. § 27-2538.

Respondent maintains that this Court's Rule 17 and prior decisions of this Court preclude consideration of these issues. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

In the recent decision of Webb v. Webb, 451 U.S. 493, 501 (1981), this Court rejected the Petitioner's argument that her reference to "full faith and credit" in the state court proceedings necessarily presented an issue under the federal constitution's full faith and credit clause. This Court held:

At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently

sure, when a state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court. (Emphasis in original).

Accordingly, if there must be "no doubt" that a particular claim was presented, Respondent maintains that the Georgia Supreme Court's obligation to review the entire record under the Unified Appeal Procedure does not sufficiently insure that the issues were presented to, and resolved by, the state court.

Therefore, Respondent submits that this Court is without jurisdiction to consider Petitioner's arguments regarding the trial court's response to the jury inquiry on consecutive sentencing and the alleged right of a defendant in a capital case to be personally advised of his right to address the jury at the sentencing phase.

II. THE GEORGIA SUPREME COURT PROPERLY
UPHELD THE USE OF "OTHER CRIMES"
EVIDENCE AT PETITIONER'S TRIAL.

Petitioner contends that his rights under the Fifth, Eighth and Fourteenth Amendments were violated by the introduction of testimony relating to similar acts or other crimes committed by Petitioner.

Respondent maintains that the evidence was properly admitted under Georgia law and that the application of the state evidentiary rule did not serve to deprive Petitioner of a fundamentally fair trial.

In Georgia, the general rule precludes admission of evidence of independent crimes;¹ however, a well-established exception permits the introduction of similar acts for the purpose of showing motive, scheme, plan or course of conduct:

Before evidence of independent crimes is admissible two conditions must be satisfied. First, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tends to prove the latter.

French v. State, 237 Ga. 620, 621, 229 S.E.2d 410 (1976).

Accord: State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980).

In the present case, the defense offered the testimony of Petitioner's sister, Willie Kate Dixon, and Petitioner's former girlfriend, Betty Jean Darrisaw, for the purpose of showing Petitioner's similar motive, scheme and bent of mind.

¹O.C.G.A. § 24-2-2; Ga. Code Ann. § 38-202.

(T. 692). Petitioner's attorney was afforded the opportunity to cross-examine each witness outside the presence of the jury and before their testimony was presented to the jury, the trial court carefully instructed the jurors regarding the limited purpose for admitting such evidence:

This evidence that this witness is about to give relating to possible criminal conduct on the part of this defendant in another incident and occurrence not connected with the death of the four individuals involved in this case, is not introduced for the purpose of being direct evidence as to those occurrences, but only for the purpose, if it does show, this defendant as the person who has manifested a motive or plan or scheme or bent of mind or course of conduct that may be relevant to the motive, plan, scheme, bent of mind, and course of conduct, if any, in the cases now on trial.

(T. 707). The trial judge also instructed the jury at the close of the evidence as to the purpose for admitting evidence of similar criminal acts. (T. 959-60).

The testimony of both Ms. Dixon and Ms. Darrisaw meet the two prerequisites under Georgia law: identity of the perpetrator and similarity of the acts. First, Petitioner was conclusively identified as the perpetrator of the other similar acts. Petitioner was convicted of the burglary of Willie Kate Dixon's house with the intent to commit a felony therein, namely, rape. (T. 696). Petitioner admitted forcibly removing his girlfriend, Betty Jean Darrisaw, from her parents' home. (T. 784). Second, there is sufficient similarity between the present offense and the two subsequent assaults: all three

events involve violent, unprovoked attacks by Petitioner on black females, each victim was previously known to Petitioner, not a stranger, in each instance Petitioner either assaulted the women at their home or removed them from their home for that purpose, in all three cases Petitioner had been drinking prior to the attack, each incident occurred between 9:00 p.m. and 1:30 a.m. and, significantly, each attack was motivated by Petitioner's desire to have sexual relations with the victim.

Contrary to Petitioner's contentions, his underlying sexual motivation was proven by his own statements in regard to Ms. Dixon's assault.² Petitioner later forced Ms. Dixon to the floor while he pulled his pants off when Ms. Dixon's grandson struck Petitioner with a chair. (T. 711). In regard to Ms. Wynn and Ms. Darrisaw, significant circumstantial evidence proved the sexual motivation of Petitioner. Ms. Wynn's body was clothed only in panties and the remnants of a torn dress. (T. 517). Her torn nightgown was located close to the pond where her body was recovered. (T. 611-12). Immediately prior to her murder, the Petitioner had been kissing and hugging the victim. (T. 639). Ms. Darrisaw had been Petitioner's live-in girlfriend and at the time of the assault she had terminated that relationship. (T. 732, 736). Petitioner pulled Ms. Darrisaw out of her parents' home, into a deserted field and laid down next to her; she escaped Petitioner only by hitting him with a bottle. (T. 735).

The admissibility of other crimes evidence has been recognized by the federal courts:

Evidence of a defendant's criminal acts not
charged in the indictment or information

²Ms. Dixon testified that Petitioner demanded entry to her home stating "I'm going to get me some of this Goddamn pussy fore (sic) I leave here tonight." (T. 709).

"may be presented when 'they are so blended or connected with the one on trial so that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged.'" United States v. Miller, 508 F.2d 444, 448-49 (7th Cir. 1974). Accord, Ignacio v. Territory of Guam, 413 F.2d 513, 520 (9th Cir. 1969), cert denied, 397 U.S. 943, 90 S.Ct. 959, 25 L.Ed.2d 124 (1970).

The evidence was essential to prove the context of the crime and Petitioner's intent, opportunity, preparation, plan, knowledge, identity and absence of mistake or accident. The trial judge cautioned the jury concerning the limited purpose for which the evidence had been introduced. (footnote deleted).

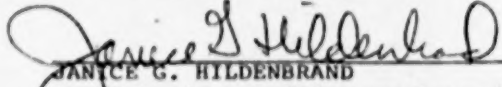
Cooper v. Campbell, 597 F.2d 628, 632 (8th Cir. 1979), cert. denied, 444 U.S. 852. In Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980), the court held that admission of other crimes evidence is proper to show motive, opportunity, intent or absence of mistake and that reversal is warranted only upon "a showing of gross or conspicuous prejudice." Id., at 575.

Based on the foregoing, Respondent maintains that the testimony of Ms. Darrisaw and Ms. Dixon was properly admitted at Petitioner's trial and presents no issue warranting review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Jimmie Lee Burden, Jr.

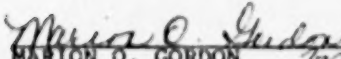
Respectfully submitted,



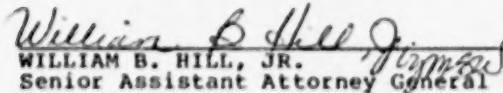
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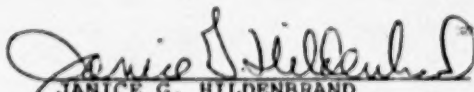
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CERTIFICATE OF SERVICE

I JANICE G. HILDENBRAND, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States Mail with proper address and adequate postage to:

Mr. Robert F. Muse
Stein, Mitchell and Mezines
1800 M Street, N.W.
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This 21st day of March, 1983.


JANICE G. HILDENBRAND
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